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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. ...1004

DOROTHY BRASWELL, Administratrix of the Estate of Courtney L. Braswell, Deceased,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois.

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To the Supreme Court of Illinois.

Petitioner, Dorothy Braswell, Administratrix of the Estate of Courtney L. Braswell, deceased, a natural person, now petitions the Supreme Court of the United States to issue its Writ of Certiorari to review the final judgment of the Supreme Court of Illinois in the cause entitled: "Dorothy Braswell, Administratrix of the Estate of Courtney L. Braswell, deceased, Petitioner v. The New York, Chicago and St. Louis Railroad Company, Respondent," which final judgment denied petitioner a review by the Supreme Court of Illinois of a decision of the Appellate Court of Illinois, Fourth District, in the cause in the last named court entitled: "Dorothy Bras-

well, Administratrix of the Estate of Courtney L. Braswell, deceased, Plaintiff-Appellee v. The New York, Chicago and St. Louis Railroad Company, Defendant-Appellant." The decision of the Appellate Court reversed without remandment a prior judgment entered by the Circuit Court of Madison County, Illinois, on the verdict of a jury, in the amount of Sixty-Five Thousand Dollars ($65,000.00) in favor of Petitioner's decedent, Courtney L. Braswell and against Respondent, The New York, Chicago and St. Louis Railroad Company.

REPORTS OF OPINIONS BELOW.

The judgment of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal was entered on January 21, 1964, and was not accompanied by an opinion.

The Appellate Court of Illinois filed its opinion June 3, 1963, and it is reported in 43 Ill. App. 2d 21, 192 N. E. 2d 592.

A Petition for Rehearing was denied September 30, 1963. The Court's opinion is set forth as Appendix to this petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

(i) The date of judgment of the Supreme Court of Illinois sought to be reviewed is January 21, 1964. It was entered on that day.

(ii) No rehearing of the judgment was sought or ordered and there has been no extension of time within which to seek Certiorari.

(iii) The statute confirming jurisdiction on this Court to review by Writ of Certiorari is U. S. C., Title 28, Section 1257 (3).

QUESTION PRESENTED FOR REVIEW.

The suit is one for damages under the Federal Employer's Liability Act, brought by a section laborer against his railroad employer for injuries resulting in whole or in part from the negligence of employer's medical staff in assigning him to a job he was physically unable to perform. He suffered a physical collapse from the strain and exertion of lifting railroad ties and fell unconscious at his place of work on the railroad's right-of-way sustaining compressed fractures of two vertebrae, rendering him permanently and totally disabled.

The theory of liability upon which the case was tried was that the employer's medical staff, having full knowledg of plaintiff's physical condition, negligently assigned him to work at a job he was physically unable to perform, and he was kept on that job in spite of complaints made by a foreman to his superiors that plaintiff could not perform his work.

The jury returned a verdict in favor of the plaintiff and the trial court entered judgment thereon.

The Question Presented for Review Is:

Can an Appellate Court properly reverse the judgment of the trial court and set aside the verdict of a jury on the ground that, to use the language of the Appellate Court: "Under the facts and circumstances on the record before us, we cannot say that there was positive proof of actionable negligence as the proximate cause of injuries suffered by plaintiff" (App. p. 24) when there is evidence in the record as follows:

(a) Dr. Wahl, examining physician for the defendant, testified and was quoted in other testimony as having an opinion that Braswell was physically unfit to perform

the work or withstand the physical strain of section gang labor (A. 88, 89). Dr. Wahl is quoted as saying, "You're not able to go to work on that job, that work will kill a good man, let alone one in your shape . . ." (A. 89).

(b) Dr. Donald C. Darrah, Assistant Medical Director of defendant railroad, told plaintiff on June 10, 1957, not to do any heavy lifting and that he would see to it that plaintiff would not be required to do such work (A. 56, 57, 90).

(c) The testimony of Louis Schien, foreman, that plaintiff could not perform the work assigned to him, and that Schien complained to his superiors about it (A. 44).

(d) Plaintiff's physical collapse into unconsciousness while performing a heavy task thus demonstrating his physical inability to perform the job assigned to him (A. 36, 40).

(e) Defendant's failure to present any evidence tending to prove plaintiff's collapse was due to any cause other than his physical incapacity to perform the work assigned to him.

(f) Dr. Edward L. Hediger's testimony that plaintiff was unfit for any work requiring heavy lifting or physical stress or strain (A. 73).

(g) The testimony of fellow laborers, James Garrison (A. 56), Maynard Hemkin (A. 40) and Foreman Louis Schien (A. 43), that Braswell was physically unable to perform the work although he tried to do so.

(h) Braswell's fellow employees saw him collapse and fall unconscious to the ground (A. 36, 38, 40, 42, 47, 48).

STATUTE INVOLVED.

The statute involved is U. S. C., Tit. 45, § 1, as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 1, 53 Stat. 1404."

STATEMENT OF THE CASE.

Courtney Braswell, the plaintiff, age 59, married and the father of six children, had earned his living at various laboring jobs from the time he was ten years old until he became ill with lung cancer in 1955 and had never been unemployed for any substantial length of time (A. 84, 93, 94). He worked for the defendant railroad as a section laborer from 1947 until his illness in 1955 and under foreman, Louis Schien, from 1950 until 1955. Before his illness Braswell was a good worker (A. 43). Beginning in November, 1955, a series of operations was performed at Barnes Hospital, St. Louis, Missouri, in a clinic directed by Dr. Thomas Burford. These operations involved the removal of his entire right lung and all of the ribs on the right side. He was not discharged from treatment until October 1, 1956 (A. 53, 63, 64, 86 and 87).

A Dr. Ferguson, one of Dr. Burford's subordinates, discharged Braswell from the clinic on October 1, 1956 to go back to work. Neither Dr. Burford nor Dr. Ferguson ever examined or treated Braswell (A. 87, 88 and 96). Shortly thereafter he reported to his superior for work and was referred to Dr. Eugene Wahl of Edwardsville, Illinois (A. 88 and 89), an examining physician for the defendant. Dr. Wahl has held this post for about 35 years and has examined hundreds of prospective employees (A. 75). He refused to pass or approve Courtney Braswell as physically fit to work and referred him to Dr. John W. Houk, the Medical Director of the railroad in Cleveland (A. 81, 88, 89 and 126). Dr. Wahl said to Courtney Braswell, "You're not able to go to work on that job; that work will kill a good man, let alone one in your shape and I don't want them sending you here no more" (A. 89). Plaintiff was given thorough physical examinations on two separate occasions in Cleveland in

February and March of 1957 and a superficial one on June 10, 1957 (A. 125, 126, 89, 90). At the request of Dr. Donald C. Darrah, Assistant Medical Director of the Defendant, a disputed letter from Dr. Burford was obtained (A. 90). The introduction of this letter into evidence by the defendant was refused by the trial court (A. 130) (Defendant's Exhibits No. 2 and No. 3 are the same, see A. 130 and 154). Defendant raised the issue of the admissibility of this letter on appeal. The Appellate Court did not decide this issue but did refer to the letter in its opinion as follows: "One doctor refused to certify him for employment and finally plaintiff went to Cleveland, where he was examined by defendant's Assistant Medical Director who refused to pass him for work, but suggested it might be helpful if he obtained a written report from the St. Louis surgeon. The surgeon wrote a letter to the Medical Director for defendant Railroad Company, concluding that he considered plaintiff definitely employable. Another doctor for the railroad thereupon authorized plaintiff to return to work, and plaintiff resumed work on June 13, 1957." A correct statement of facts concerning this letter and events connected with it are as follows: Dr. Donald C. Darrah, Assistant Medical Director of defendant railroad, has offices in Cleveland with Dr. John W. Houk, the Medical Director (A. 118). A complete physical examination was given Braswell by Dr. Darrah at Cleveland on Feb. 15, 1957 (A. 126). Dr. Darrah postponed making a decision on Braswell's physical condition and fitness for work (A. 55, 90, 126). He asked Braswell, "Would you have Burford to write me a letter up here explaining your condition"? (A. 90).

On June 10, 1957, Dr. Houk authorized plaintiff's return to work knowing the nature of the work he was to perform (A. 125). Dr. Darrah also approved Braswell for work saying, "I'm going to put your husband back to work," and he added, "Help me take care of him" (A.

90). Dr. Darrah instructed Braswell in the presence of Dorothy Braswell, his wife, not to do any heavy lifting and he said he would notify Bracken's office to that effect (A. 56, 57, 90). Dave Bracken was the superior officer of Louis Schien, foreman over Braswell (A. 42, 44). Drs. Houk and Darrah did see the disputed letter which specifically states, "This man has asked that I write you the facts concerning his illness and operations . . .". Then follow the facts (which are not disputed or an issue in this case) and closes with the gratuitous and objectionable opinion, "I consider him definitely employable."

Dr. Darrah failed to notify Dave Bracken or Louis Schien that Braswell was not to do any heavy lifting (A. 50, 91).

Braswell returned to work on June 13, 1957 and suffered a physical collapse and injury from the strain and exertion of lifting ties on July 3, 1957, as alleged in paragraph 3 of the Complaint (A. 2, 36, 40 and 47). He remained unconscious until treated at St. Joseph's Hospital in Highland, Illinois, the same day (A. 92). His physical injuries were diagnosed as compressed fractures of the first and second lumbar vertebrae (A. 71). During the short time he worked in June and July of 1957, he was not able to perform the work assigned to him (A. 43 and 44).

James Garrison, a fellow laborer, testified, "Courtney could not do the work that was assigned to him although he made an effort to do it" (A. 36). Maynard Hemkin, a fellow laborer, testified, "Well, he couldn't lift with us" (A. 40). The foreman, Louis Schien, noticed that Braswell was not able to perform his task and testified, "When Braswell came back to work on June 13, his physical appearance was different than when he left the job in 1955. It didn't seem to me he had any body on his right side. He was willing to do his work when he came

back, but it looked to me like it was awful hard on him. He worked at it, I'll say that for him, but he didn't perform as the other men did" (A. 43).

"I complained to my superior officer, Dave Bracken . . ." (A. 44).

Mr. Schien also talked to a Mr. Cricket, Bracken's assistant (A. 44, 45), who responded, "You'll have to get along with him the best you can because the doctor turned him loose to go back to work" (A. 46 and 47). Braswell did not complain and tried to perform his job (A. 43). He was as persistent in his desire to be reemployed as he was in trying to perform his work. He felt that it was necessary for him to work (A. 88 and 89), and relied on the medical staff of the defendant railroad to determine his fitness for work (A. 100, 103 and 115).

Dr. Edward L. Hediger of Highland, Illinois, the physician who treated Braswell while he was a patient at St. Joseph's Hospital in Highland, testified, "I personally would be very hesitant to send a man back to hard manual labor after this type of surgery and his general physical condition" (A. 73) and stated that such a man as Braswell could perform any type of work that did not require heavy lifting or physical stress or strain (A. 73).

Before Braswell collapsed while moving railroad ties on July 3, 1957, he was able to perform some work; afterwards, he could not stand up even for X-rays of his spine (A. 72).

Prior to July 3, 1957, although Braswell had a series of operations as described, there is no evidence of any other traumatic injury. After July 3, 1957, and at the time of the trial, Braswell was totally disabled (A. 60, 83, 94). Although defendant in its Amended Answer denies that plaintiff suffered any injuries (A. 25), it states by affidivit in support of a Motion for Continuance that plaintiff sus-

tained recent fractures of the spine as revealed by X-rays taken by defendant's doctors (A. 24). After being discharged from St. Joseph's Hospital, Braswell sought medical attention and relief from the pain resulting from his injury, insofar as his financial resources would permit (A. 92 and 93). He became totally disabled, unfit for even the lightest work and suffered pains in his back (A. 83, 84 and 94). Plaintiff's normal weight prior to 1955 was about 135 pounds (A. 94). He weighed 105 pounds when assigned to work on June 10, 1957 (A. 59), and at the time of the trial weighed 107 pounds (A. 94). He was 5' 3" tall. The only X-ray available to him of his spine, taken before the injury of July 3, 1957, reveal no deformity (A. 78). The X-rays taken by Drs. Hediger and Rehberger after the injury were introduced in evidence by the plaintiff. Defendant did not offer in evidence any of the X-rays taken by its medical staff in February and March of 1957 or those taken by its doctors after July 3, 1957. Defendant offered no evidence concerning plaintiff's injury or disability although he was examined thoroughly before July 3, 1957 (A. 89, 90, 125 and 126), and after July 3, 1957. The case was tried before the judge and jury in the Circuit Court of Madison County on January 15, 16, 17 and 18, 1962, and the jury returned a verdict for the plaintiff and against the defendant assessing damages in the amount of $65,000.00. All post trial motions were denied and judgment entered on the verdict on January 19, 1962. Thereafter, defendant appealed to the Appellate Court of Illinois, Fourth District. During the pendency of the appeal, Courtney Braswell died and his widow, Dorothy Braswell, was named Administratrix of his estate by the Probate Court of Madison County, Illinois. Dorothy Braswell, as Administratrix, has been substituted as party plaintiff. On June 3, 1963, the Appellate Court filed its opinion reversing the judgment of the trial court and entered judgment for the defendant. Petitioner

filed a timely Petition for Rehearing which was denied September 30, 1963, the date of final judgment in the Appellate Court. Thereafter, Petitioner filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois which was denied January 21, 1964 without opinion. No rehearing was sought or ordered.

RAISING OF FEDERAL QUESTION.

The applicability of federal law was inherent from the inception of this case: the complaint was founded on the Federal Employers' Liability Act. The opinion of the Appellate Court of Illinois (Appendix) shows the filing under that act, and the determination of the cause under that act.

NO REVIEW OF FEDERAL COURT DECISION SOUGHT.

No review of any federal court judgment is sought by this petition.

ARGUMENT AND REASONS FOR THE ISSUANCE OF WRIT.

The Illinois courts in their decisions below continue to invade the province of the jury in F. E. L. A. cases by determining that evidence introduced by the plaintiff was of insufficient weight to warrant a verdict in favor of the plaintiff despite decisions of this court.

> "We think that the Illinois Courts improperly invaded the function and province of the jury in this case."
>
> Harrison v. Missouri Pacific Railroad Co. (372 U. S. 248, 249).

In the case at bar the Appellate Court said: "Under the facts and circumstances on the record before us, we

cannot say that there was positive proof of actionable negligence as the proximate cause of the injuries suffered by the plaintiff . . ." (App. p. 24). This statement is in error in law and fact.

Plaintiff proved the following actionable negligent acts or omissions on the part of defendant:

(a) Dr. Houk's authorization of June 10, 1957 for plaintiff, Courtney Braswell, to return to employment as a section gang laborer (A. 125).

(b) Dr. Darrah's failure to notify plaintiff's foreman, or other person in authority, that plaintiff was not to do any heavy lifting (A. 50, 56, 57 and 90).

(c) Defendant's failure to act upon the knowledge of and information given by its foreman, Louis Schien, relative to plaintiff's physical incapacity to perform the work of a section laborer (A. 43, 44, 45, 46 and 47).

The defendant has not denied, nor does the Illinois Court question the fact of plaintiff's collapse into unconsciousness almost instantly after helping to carry the last of four railroad ties he and fellow workmen were placing on a small pushcar on defendant's right-of-way during the course of his employment on July 3, 1957.

The following evidence was introduced to sustain plaintiff's contention that defendant negligently assigned plaintiff to a job he was physically unable to perform:

1. The undisputed testimony that he did collapse into unconsciousness while attempting to perform his work (A. 36, 40).

2. The testimony of Dr. Eugene Wahl, examining physician for the defendant, that he refused to pass or approve plaintiff as physically fit to work (A. 88, 89, 126).

3. Dr. Wahl's statement to Braswell that he was unable to work as a section laborer and that such work would kill a good man, to say nothing of a man in Braswell's physical condition (A. 89).

4. The statement of Dr. Donald C. Darrah, Assistant Medical Director of the defendant, that plaintiff was to do no heavy lifting, and that he would notify the proper supervisory personnel to that effect (A. 56, 57, 90).

5. The testimony of Louis Schien, foreman, that Braswell could not perform the work assigned to him and that Schien complained to his superiors about it (A. 44).

6. The testimony of Dr. Edward L. Hediger, who examined and treated plaintiff at St. Joseph's Hospital, Highland, Illinois, on July 3, 1957, that a man in Braswell's physical condition was unfit for any work requiring heavy lifting or physical strain (A. 73).

7. The testimony of fellow laborers, James Garrison (A. 56); Maynard Hemkin (A. 90); and the foreman, Louis Schien (A. 43) that Braswell was physically unable to perform the work although he tried to do so.

8. The subsequent examination of plaintiff which revealed no other cause for his collapse (A. 72).

9. And finally, the evidence of plaintiff's general physical condition, slight build, and his previous operative history (A. 94, 95, 96).

The following direct and circumstantial evidence was introduced to prove a causal connection between plaintiff's collapse and his injury:

1. The undisputed testimony that immediately before he collapsed plaintiff had assisted in carrying four railroad ties (A. 36, 40).

2. The examination, diagnosis and treatment of compressed fractures of the first and second lumbar vertebra by Doctor Hediger (A. 71).

3. X-ray pictures taken July 5, 1957, in St. Joseph's Hospital, showing the fractures in question, and X-ray pictures taken by Doctor Lester Rehberger January 18, 1958, showing the healed-compression fracture (A. 62).

4. The undisputed testimony that plaintiff was examined and X-rayed by defendant's doctors on two occasions shortly before he was employed on June 10, 1957 (A. 89, 90, 125, 126). The defendant did not offer these X-rays in evidence.

5. The undisputed evidence that plaintiff worked from June 13th to July 3, 1957, the day of his injury (A. 35, 40, 43).

The courts below have imposed a burden of proof not sanctioned by this court in cases brought under the Federal Employers' Liability Act ignoring the repeated declarations of this court in such cases. The Illinois courts continue to apply common law principals in respect to the sufficiency of evidence, and when the evidence does not meet what in their opinion is an acceptable quantum of proof, simply announce that there was no evidence, or positive evidence, or that circumstantial evidence is insufficient to justify recovery. Such determinations are not permissible under actions brought under the F. E. L. A.

> "Judicial appraisal of the proofs (in a Federal Employers' Liability Act case) to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal

and, if that test is met, are bound to find that a case for the jury is made out, whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence."

Rogers v. Missouri Pacific, 352 U. S. 500, 507, 1 L. Ed. 2d 493, 77 S. Ct. 443.

"The decisions of this Court after the 1959 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

(Ibid. 510.)

It is only when there is a complete absence of probative facts to support the conclusion reached that the jury's verdict based upon the conclusion may be set aside by the Appellate Court.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required. . . . Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and the Appellate Court's function is ex-

hausted when that evidentiary basis becomes apparent, ..."

Lavender v. Kurn, 327 U. S. 645, 653.

The Court below commented disparagingly of the sufficiency of circumstantial evidence. Although there is substantial direct evidence in the record, a verdict must be sustained if based upon circumstantial evidence alone.

"The burden of the employer is met, and the obligation of the employer to pay damages arises when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

Rogers v. M. Pac. R. R. Co., 352 U. S. 500, 508.

"As previously noted, the evidence pertaining to the alleged accident is entirely circumstantial. The Court has repeatedly held that the fact that an injury resulting in death arose out of employment need not be proved by direct evidence, but may be established by circumstantial evidence leading to a logical and reasonable inference that the injury originated in a risk of the employment."

Siete v. Industrial Commission, 24 Ill. 2d 368, 375, 181 N. E. 2d 156, 159.

". . . the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that * * * the jury may also with reason * * * attribute the result to other causes, including the employee's contributory negligence."

Southern Railroad Co. v. Welch, 247 F. 2d 340, 342.

"General common law rules of liability, and state practices in respect of the sufficiency of evidence, do not govern cases under the Federal Employers' Liability Act, for the legislation is an avowed departure from the common law—a response to the special needs of railroad workers."

Tiller v. Atlantic Coast Line, 318 U. S. 54;
Sinkler v. Missouri Pacific, 356 U. S. 326;
Lavender v. Kurn, 327 U. S. 645.

The Appellate Court said, "None of the doctors called on behalf of plaintiff expressed an opinion as to whether there might have been a relationship between the work he did as a cause of his unconsciousness and fall to the ground and his resulting disability" (Appendix p. 23).

Although the Court accepted the fact of plaintiff's disability, petitioner has difficulty interpreting the foregoing quotation. Regardless of the intended meaning of the quotation, petitioner respectfully submits that a doctor's testimony as to what "might have been a relationship between" any of the acts and conditions mentioned in the quotation was not required, even if admissible, because of the direct and circumstantial evidence introduced by plaintiff.

"Expert testimony is admissible when the inquiry is such that only persons of skill, experience and knowledge in the subject of the inquiry can form a correct judgment; . . . The testimony of experts is received in evidence on matters of their superior knowledge, but is not received on matters of common knowledge, or where the jury can properly comprehend and weigh the facts."

Illinois Law and Practice, Volume 18, pages 434, 435.

"The general rule, as pronounced by the Illinois courts, is that, in a personal injury action where the evidence is conflicting as to whether plaintiff was injured in the manner claimed, opinion testimony on such subject is incompetent, but that where there is no dispute as to the manner of injury and the question is whether certain principal conditions were caused by the injury complained of and the determination of such question involves a special skill or trade or knowledge of science not within the experience of laymen possessing the education or knowledge common to those moving in the ordinary walks and engaged in the ordinary occupations of life, persons possessing such special knowledge, skill, or science may testify as to their opinions on the subject.

Accordingly, where there is no dispute as to the fact, manner and cause of an injury resulting from the acts complained of, a physician may directly testify that a later disability, malady, or death was or was not caused by the original injury. But when there is a conflict in the evidence as to whether the injury was received in the manner charged, it is not competent for witnesses, even though testifying as experts, to give their opinion as to the cause of disability or death."

Illinois Law and Practice, Volume 18, pages 450, 451.

CONCLUSION.

The trial court fully and correctly instructed the jury on negligence and contributory negligence, and the jury correctly decided that defendant was negligent and plaintiff's negligence, if any, was minute compared to that of defendant's staff of medical specialists. It was undisputed that plaintiff wanted to work, felt it was necessary for

him to work, and relied on the opinion and decision of defendant's doctors concerning his physical fitness for work. While moving railroad ties he collapsed and was found to have sustained compressed fractures of two lumbar vertebrae. He was treated in a hospital in the customary and approved way and later received treatments for pain which brought him only temporary relief. X-rays were taken in the hospital immediately after the injury and again in January, 1958. These X-rays were introduced in evidence and interpreted by the treating physicians. A doctor employed by the Social Security Agency testified that plaintiff was disabled. This evidence and testimony was not denied by defendant who offered no medical evidence or testimony of any kind except that of Dr. Houk.

The only conclusions the jury could reach were that defendant was negligent as alleged, plaintiff was injured as alleged, and at the time of trial was totally and permanently disabled and entitled to substantial damages. He was a man of limited education and ability for anything other than physical labor. There are many kinds of labor and section labor is one of the hardest. From June 13, 1957 until July 3, 1957 plaintiff was able to perform some physical tasks and if he had not collapsed under the strain of section labor he could have been employed at light work. In addition, plaintiff's physical condition was such that any injury or illness would be very serious. During the course of the appeals he has died leaving his wife with two minor children.

The trial court has the only opportunity to see and hear the witnesses and examine the evidence and to weigh and consider the verdict of the jury in the light of all that transpired during the trial. It is only when the trial court has committed serious error, thereby denying the parties a fair trial, and the jury has returned a shockingly inadequate or excessive verdict, that an appellate court may

properly disturb the judgment of the trial court by ordering a new trial.

In this case the Appellate Court of Illinois, Fourth District ignored the facts and repeated its previous legal errors in cases involving the F. E. L. A.

Wherefore, Petitioner respectfully asks this court to issue its writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

DOROTHY BRASWELL, Administratrix of the Estate of Courtney L. Braswell, Deceased,

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APPENDIX.

OPINION OF THE APPELLATE COURT.

State of Illinois,
Appellate Court,
Fourth District.

May Term, A. D. 1963.

Term No. 63-F-6. Agenda No. 10.

Dorothy Braswell, Admrx. of the Estate of Courtney L. Braswell, Deceased,
Plaintiff-Appellee,
vs.
The New York, Chicago and St. Louis Railroad Company,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County, Illinois.

Culbertson, P. J.

This cause is before us on appeal from a judgment in the sum of $65,000.00, based on a verdict of a jury in a Federal Employers' Liability Act case instituted by Courtney L. Braswell, as plaintiff, as against The New York, Chicago and St. Louis Railroad Company, as defendants. During the pendency of this appeal, plaintiff's death has been suggested, and Dorothy Braswell, Administratrix of the Estate of Courtney L. Braswell, has been substituted as party plaintiff.

The case is unusual in that the negligence alleged is predicated on alleged negligence of defendant company in the assigning of Braswell to a job which it was con-

tended he was physically unable to perform. Braswell, who was 60 years of age, had been working as a section hand since 1947, and had apparently performed the duties satisfactorily until the early part of 1955 when he developed a persistent cough. This became sufficiently severe in November, 1955, so that on the advice of his personal physician he was hospitalized in St. Louis. The doctors there found him suffering from a carcinoma of the right lower lobe of the lung, and a portion of the lung was removed surgically. He was discharged from the hospital and thereafter developed an infection in his chest cavity which resulted in a series of operations involving a rib resection, drainage, and plastic repair of the chest cavity. On October 1, 1956, he was given a written release by the surgeon, reciting that he was able to return to work. He then reported to his foreman with a request that he be returned to work as a section hand, his former type of work. For a period of eight months, until he was permitted to return to work in June of 1957, he made repeated demands to be returned to the job as a section hand.

One doctor refused to certify him for employment, and finally plaintiff went to Cleveland, where he was examined by defendant's Assistant Medical Director who refused to pass him for work, but suggested it might be helpful if he obtained a written report from the St. Louis surgeon. The surgeon wrote a letter to the Medical Director for defendant Railroad Company, concluding that he considered plaintiff definitely employable. Another doctor for the railroad thereupon authorized plaintiff to return to work, and plaintiff resumed work on June 13, 1957. He continued to work without any complaint or incident (including Saturdays and Sundays), until the morning of July 3, 1957. He helped carry railroad ties and did other sectional work without experiencing any physical disability in so doing, and made no complaint of any kind in

connection with such work. On July 3, 1957, while acting with the other three men in his section in carrying railroad ties, he suddenly collapsed. There was nothing unusual, so far as the record discloses, in the work which was done at the time of his collapse. None of the doctors called on behalf of plaintiff expressed an opinion as to whether there might have been any relationship between the work he did as a cause of his unconsciousness and fall to the ground and his resulting disability.

On appeal in this Court it is the defendant's position that the proof produced to support plaintiff's cause of action was insufficient, as a matter of law, to present a submissible question to the jury thereon, and that the Trial Court should have allowed the motion for judgment notwithstanding the jury's verdict.

It is apparent that plaintiff relied wholly upon the circumstances and was not able to, or at least did not specifically make a showing of a causal connection of the collapse of plaintiff and his subsequent injury. Plaintiff states specifically that the circumstances speak for themselves and that plaintiff was undergoing what for him in his physical condition was extreme physical exertion, and that the collapse was the result. None of the persons who were with plaintiff could offer any explanation for what happened. The plaintiff experienced no pain in his back before he fell, and he felt no strain as he lifted and carried one handle of the tie tongs, nor had he exhibited or felt any specific physical symptoms of ill being before he lost consciousness and fell. He simply stated that "he didn't know what happened." Under the circumstances, the jury's conclusion that the plaintiff's injuries were causally related to defendant's claimed negligence in returning him to work, would necessarily be based entirely on surmise or conjecture. This cannot be the basis upon which a verdict can be sustained (Withey v. Illinois Power Co., 32

Ill. App. 2d 163, 170). We have repeatedly stated that under the law, an affirmative and positive showing of actionable negligence as the proximate cause of injuries, must be made. The fundamental basis of a right to recover must necessarily be a showing of a causal connection, ascertainable from the evidence and the record, or circumstances which clearly establish such connection, before a recovery can be sustained.

Under the facts and circumstances on the record before us, we cannot say that there was positive proof of actionable negligence as the proximate cause of the injuries suffered by plaintiff (Withey v. Illinois Power Co., supra; Deming v. Hallberg, 221 Ill. App. 180; Jensen v. Elgin Joliet & Eastern Ry. Co., 15 Ill. App. 2d 559). In the latter case cited, the plaintiff had, likewise, maintained an action under the Federal Employers' Liability Act, to recover damages for a ruptured intervertebral disc which he received as the result of defendant's negligence in maintaining a defective switch. The Appellate Court there likewise concluded that plaintiff had failed to show a causal connection between the injury and the accident, and the Court there rightly points out that the burden was on the plaintiff to establish by a preponderance of the evidence not only that the injury existed, but also that the injury was the result of an occurrence of which he complained. The Court in that case pointed out that the disability of the plaintiff and its cause could have been a matter of expert opinion which should have been proved by testimony of medical experts and not left to the speculation of the jury, and that in absence of a showing of such causal connection between the accident and the injury, no recovery could be had.

We, therefore, conclude that the Trial Court should have allowed the motion for directed verdict, or for a judgment notwithstanding the verdict, and the judgment of the

Circuit Court of Madison County will, therefore, be reversed and judgment entered here in favor of defendant.

Reversed, and judgment entered here.

Scheineman, J., and Hoffman, J., Concur.

Publish in full.

Filed June 3, 1963, James R. McLaughlin, Clerk of the Appellate Court, Fourth District of Illinois.

I, James R. McLaughlin, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, Do Hereby Certify, that the foregoing is a true copy of the Opinion of the said Appellate Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed my seal of said Court at Mt. Vernon, this 3rd day of June, A. D. 1963.

James R. McLaughlin,
Clerk of the Appellate Court.

(Seal)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1004.

DOROTHY BRASWELL, Administratrix of the Estate of Courtney L. Braswell, Deceased,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

BRIEF

For Respondent in Opposition.

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BRIEF

For Respondent in Opposition.

There is no special or important reason for this Court to review the judgment of the Appellate Court of Illinois for the Fourth District or the refusal of the Supreme Court of Illinois to grant leave to appeal from such judgment. The Appellate Court, without reaching the ques-

tion of whether respondent was negligent in returning Braswell to work as he had repeatedly requested it to do, found, that the absence of any proof to causally relate Braswell's unconsciousness and fall to his work, entitled respondent to judgment. In so doing, it recognized and applied the established principle that damages may not be awarded for personal injuries in the absence of proof to causally relate the injuries claimed to the negligence charged. Neither this rule nor its application to this case requires review by this Court. The petition for a writ of certiorari should be denied.

QUESTIONS PRESENTED FOR REVIEW.

(1) Can damages be awarded for personal injuries in the absence of any proof to causally relate the injuries claimed to the negligence charged?

(2) Can a railroad worker, whose complaint charges that he "suffered a physical collapse and injury from the strain and exertion of lifting (railroad) ties and fell unconscious at his place of work," who carried ties for a week without mishap, who "felt all right" and who "hadn't noticed anything unusual about (his) physical condition" before he lost consciousness and fell, who testified he didn't know what happened to cause him to lose consciousness and fall, and who offered no proof by any lay or medical witness that his loss of consciousness and fall were related in any manner to his work, recover damages from his employer on such charge?

(3) Is a verdict of a jury in a railroad worker's suit against his employer immune from correction by a reviewing state court when such verdict is patently erroneous in reaching a conclusion which the law will not permit?

STATEMENT OF THE CASE.

Braswell limited his right to recover damages to the charge made in his complaint that while he "and other employees of defendant were engaged in lifting and placing Defendant's railroad ties on a small railroad car" he "suffered a physical collapse and injury from the strain and exertion of lifting said ties and fell unconscious at his place of work" and that this collapse and injury resulted from respondent's negligence in assigning him "to a job which he was physically unable to perform" (A. 2, 3). Whether there was any basis in the evidence to support the charge that Braswell lost consciousness and fell from the strain and exertion of lifting ties was an issue which the Appellate Court was called upon to decide. It found that the record contained no such evidence. Petitioner, however, says in her Statement of the Case (p. 8):

> "Braswell returned to work on June 13, 1957, and suffered a physical collapse and injury from the strain and exertion of lifting ties on July 3, 1957, as alleged in paragraph 3 of the Complaint (A. 2, 36, 40 and 47)."

This statement is misleading and inaccurate. There is absolutely no testimony in any of the abstract references that plaintiff's collapse and injury resulted from the strain and exertion of lifting ties. The abstract references refer to the testimony of witnesses Garrison, Hempkin and Schien, who were working with Braswell on July 3. No one of these witnesses offered any explanation for Braswell's collapse and fall. All of them, on the contrary, agreed that Braswell "got along all right carrying these ties," had no "trouble getting the four ties on the push cart," and "didn't make any complaint" while he did so (A. 49, 41, 42, 38). In view of the Appellate Court's

finding in its opinion that "None of the persons who were with plaintiff could offer any explanation for what happened" (Petition p. 23) and the importance of that circumstance to its decision in this case, the inaccuracy of petitioner's statement is significant.

Braswell introduced the testimony of his wife, Dorothy (petitioner here), section workers, Schien, Garrison and Hempkin, Drs. Hediger, Gross and Rehberger, and testified in his own behalf in support of his complaint. As the Appellate Court found and the undisputed facts demonstrate, neither Braswell nor any of his medical or non-medical witnesses offered any explanation for Braswell's loss of consciousness, fall and resulting injury, and none was asked for or expressed any reason for or opinion that Braswell's exertion in lifting ties produced his unconsciousness and fall. The Appellate Court, therefore, properly found that there was an absence of any proof which causally related Braswell's injuries to respondent's claimed negligence in returning him to work and entered judgment for respondent.

In the light of petitioner's statement of the case and in fairness to the Appellate Court, respondent makes a more detailed statement than might otherwise be warranted.

Braswell, who became 60 years of age on July 25, 1962, began work as a section hand for respondent on May 28, 1947 (A. 94). He performed his duties in the section gang satisfactorily and without difficulty until late 1955 when he developed a persistent cough (A. 95). On November 19, 1955, at the advice of his personal physician, Dr. Eugene F. Wahl, he was admitted to Barnes Hospital in St. Louis, Missouri, and placed under the care of Dr. Thomas H. Burford, one of the outstanding thoracic surgeons of the Middle West, and the members of his staff (A. 95, 67, 118). Those doctors found that Braswell

had a bronchogenic carcinoma of the right lower lobe and in a series of operations which followed, his right lung was removed (A. 53, 54, 67, 95, 96). Braswell continued under the care and treatment of the members of Dr. Burford's staff until October 1, 1956, when Dr. Ferguson, one of Dr. Burford's assistants, released him to return to work on October 1, 1956 (A. 57, 69, 96).

Braswell promptly presented Dr. Ferguson's release to his foreman and requested to be returned to work as a section hand (A. 88, 99). For the next eight months and until he was permitted to return to work on June 13, 1957, Braswell made repeated and persistent demands that respondent return him to his job as a section hand (A. 57, 58, 59). At his request, Dr. Eugene Wahl examined him on three different occasions, the last of which was on December 1, 1956 (A. 89, 79). When Dr. Wahl refused to certify him for employment, Braswell wrote respondent's Roadmaster, Bracken (Def.'s Ex. No. 1):

> "Dr. Wahl said to advise you, I should be examined by the head Doctor.
>
> "Now this has been going on sense October 1, 1956. When my Doctors said I could report back to work. I would like to go to the Head Doctor to be examined and would like to here from you as soon as possible, as I think Ive been fair with both you and the Railroad Company" (A. 153).

Thereafter, Braswell, accompanied by his wife, went to Cleveland on February 15, 1957, and was examined by Dr. Donald O. Darrah, respondent's assistant medical director (A. 54, 126). (Dr. Darrah, who is now dead, was suffering from an acute heart condition which prevented him from testifying at the trial.) (A. 118). Dr. Darrah refused to pass Braswell for work but suggested Braswell have Dr. Burford write a letter explaining Braswell's condition (A. 90).

Thereafter and for the purpose of persuading respondent to put him back to work, Braswell requested Dr. Burford to and on March 4, 1957, Dr. Burford did write to Dr. Darrah (Defendant's Exhibit 2) and sent a copy of his letter to Braswell (A. 58, 118, 155). Dr. Burford detailed the operative procedures Braswell had undergone at Barnes Hospital and expressed his conclusion that "I consider him definitely employable" (A. 155).

Braswell took his copy of Dr. Burford's letter and discussed it with Dr. Darrah at his office in Cleveland early in June, 1957 (A. 55, 100, 103). Dr. Darrah advised Braswell he would be permitted to return to his job as section hand and, according to Braswell, instructed Braswell "if I got to feeling bad or I seen I couldn't stand it to notify him" (A. 110).

Braswell resumed work as a section hand at Alhambra, Illinois, on June 13, 1957 (A. 128). With the exception of one-half day, he worked continuously, Saturdays and Sundays included, and without any complaint or incident until the morning of July 3, 1957 (A. 104). During this interval he worked with his foreman, Louis Schien, and section hands, Maynard Hempkin and James Garrison, with whom he had worked prior to the onset of his illness in 1955 (A. 91). He helped carry railroad ties and did other section work without experiencing any physical disability in so doing (A. 104, 41). He made no complaint of any kind to either his foreman or fellow workmen and testified he did not report to Dr. Darrah that his work was too heavy or he felt he couldn't do it, because: (A. 110)

> "I never did notify him because I never had occasion to.
>
> "This was because I got along all right with my work for the twelve and a half days I was working and felt I could stand it."

Braswell reported for work at his regular starting time of 7:00 A. M., on July 3, 1957 (A. 104). His foreman, Schien, and section men, Hempkin and Garrison, reported for duty at the same time (A. 49, 50). These four constituted the section gang and had regularly worked together after Braswell's return to duty on June 13, 1957 (A. 40). They boarded a motor car which they obtained at the shed at Alhambra and rode four and one-half miles west of Alhambra, patrolling or inspecting the track (A. 49). They then rode back to Alhambra where they attached a push car to the motor car and rode a short distance to a place where some ties were stacked. They stopped some twelve feet from the tie pile for the purpose of loading some of the ties on the push car (A. 41, 49).

The four men spent about 20 or 30 minutes in carrying four ties from the tie pile to the push car (A. 49). The four wheel push car had a flat bed which was some two feet higher than the top of the rails (A. 49). The ties were about seven feet long and weighed approximately 200 pounds each (A. 35, 39). The four men carried each tie by using two sets of tie tongs. The tongs were about two feet in length, with two hooks on one end and two handles on the other, so that in carrying the ties two men held each tong at each end of each tie (A. 47, 49). Each of the four ties was set crosswise on the back of the push car bed and then pushed along the bed to the front end of the car (A. 49). This was exactly the same method this four man section gang had used to load ties on other days between June 13 and July 3, 1957, and was the same method respondent had always employed during all of the years Braswell had worked as a section hand (A. 39, 41, 49, 104).

Neither Braswell, Schien, Garrison or Hempkin experienced any difficulty in loading the four ties on the cart.

The ties were loaded in the usual and customary manner and nothing out of the ordinary occurred in the loading operation. The tongs were in good condition and worked properly. No one of the four men slipped or stumbled or lost his hold on the tongs or permitted the weight to shift. The men were not hurried in their work, the push car didn't move and the ties were no longer or heavier than others they had moved many times before in the same manner (A. 39, 41, 49, 50).

When the fourth tie was placed on the cart, Braswell and Garrison pushed it to the front end. Braswell started to walk toward the back of the car and fell to the ground unconscious and "just laid there staring up in the sky" (A. 48, 37, 40, 41).

Braswell, on several occasions after he returned to work on June 13, had helped carry ties of the same kind he helped carry on the morning of July 3 (A. 41, 48, 104). He described this work by saying (A. 91), "When I went back, we began carrying ties, loading ties on a push car and we'd been carrying those ties for the last week putting them in under the main track * * *." He had last done such work only a day or two before (A. 41). He had never experienced difficulty or mishap while carrying ties and experienced none on the morning of July 3. Braswell testified, "There wasn't anything different on the morning of July 3rd than there had been on the days preceding it when I had been working, that I know of" (A. 110). Braswell's witnesses, Schien, Hempkin and Garrison, all agreed that Braswell had no difficulty in and made no complaint while working on July 3 before he fell unconscious on his back. Schien put it (A. 49):

> "As near as I know, Braswell got along all right carrying these ties. He never complained or nothing.

I didn't notice anything unusual about his activity that morning until he fell and they hollered there."

Hempkin explained (A. 41, 42):

"I didn't notice that any of the four of us had any trouble getting these ties up and moved over to the car. * * *

"I didn't hear Braswell make any complaint while we were moving the four ties on the morning of July 3, 1957. He didn't say anything, if he did I don't remember it. The first thing I knew that there was anything the matter is when I looked around and saw him fall."

Garrison testified:

"While we moved the four ties and down until the time Braswell collapsed he didn't make any complaint to me and I didn't hear him make any complaint to anybody else (A. 38).

"Down until the time Mr. Braswell collapsed, we hadn't done anything different than we had done on other days in moving these ties and putting them on the push car. We were doing the work in the same way we had done it before. I didn't experience any difficulty myself in the work and I didn't notice that anybody else experienced any difficulty" (A. 39)

Braswell's account was the same as his witnesses. He testified (A. 104):

"There was nothing unusual about my work that morning that I know of. As far as I knew I felt all right up until the time this thing happened to me. Louis Schien was working on the tie tongs with me and we moved these four ties over and put them on the cart that was hooked up to the motor car. After we got the fourth one there, Garrison and I

pushed it toward the front of the car. I don't remember what I did then. I don't know what I did. Down to that point I hadn't noticed anything unusual about my physical condition and hadn't paid any attention to it."

In response to his counsel's question to explain what happened to him, he replied (A. 92):

"I don't know. I wish I did know what happened."

Braswell was taken by ambulance to St. Joseph's Hospital in Highland, Illinois, some 12 miles from Alhambra, where he regained consciousness later that day. He was treated there by Dr. Edward L. Hediger, who determined Braswell had a marked compression deformity of the first lumbar vertebra and a slight compression deformity of the second lumbar vertebra. Braswell told Dr. Hediger "he had been working and feeling okay" (A. 73, 74). That this was so was evidenced by the fact that while he weighed only 102 pounds when he started work on June 13, he weighed 110 pounds when he entered St. Joseph's Hospital on July 3 (A. 91, 74). Dr. Hediger was "amazed that his general physical condition was as good as it was when you consider the amount of surgery that he had had" (A. 72).

Braswell received hyperextension and improved sufficiently so that 10 days later on July 13, 1957, he was discharged ambulatory from the hospital and returned to his home (A. 72, 105). Thereafter Braswell was treated by Drs. Hediger and Lester P. Rehberger and examined by Dr. Richard L. Gross (A. 75, 62, 67, 83, 84).

These doctors were called as Braswell's witnesses. No one of them was asked for or expressed any opinion that there was or might have been any relationship between the work which Braswell did on the morning of July 3,

1957, and his fall. Neither of them nor any other witness offered any testimony or opinion to explain what it was or could have been which caused Braswell to become unconscious and fall to the ground, and Braswell could offer no reason for his condition since he stated simply he didn't know what happened (A. 92).

The succinct recitation of the facts which the Appellate Court made, as the foregoing detailed statement shows, was accurate and fully demonstrated, as the Court found, that there was no evidentiary basis for the verdict which the jury returned.

ARGUMENT.

A) There Was No Proof or Circumstance to Causally Relate Braswell's Injury to Respondent's Alleged Negligence.

Braswell made no claim in his complaint or contention at the trial that respondent was guilty of any act or omission just before and at the time of his fall which caused or contributed to it. The undisputed evidence was that the four railroad ties were loaded on the push car in the usual and customary way and that nothing out of the ordinary occurred during the loading operation. Braswell's claim to recovery, as the Appellate Court noted, was premised solely on the charge in his complaint that he was injured when he fell unconscious "from the strain and exertion of lifting" the four ties and that respondent was negligent in assigning him to this task which he lacked the physical ability to perform.

Braswell did not testify, as he alleged in his complaint, that he lacked the physical ability to help carry the four railroad ties as he did on July 3 or that he collapsed from the strain and exertion of so doing. His testimony was expressly and unequivocally to the contrary. What he said was:

> "When I went back, we began carrying ties, loading ties on a push car and we'd been carrying those ties for the last week putting them in under the main track * * *";
>
> "I got along all right with my work for the twelve and a half days I was working * * *";
>
> "There was nothing unusual about my work that morning that I know of. As far as I know I felt all right up until the time this thing happened to me"; and

"Down to that point I hadn't noticed anything unusual about my physical condition and hadn't paid any attention to it" (A. 91, 110, 104, 105).

Braswell didn't say he experienced any shortness of breath, or strain, or that the lifting he did on one of the tie tong handles as he had been doing on the days immediately preceding July 3, caused him any unusual exertion. He wasn't pushed, hit or struck by any object and he felt no pain in his back or other physical symptom of ill-being before he lost consciousness and fell. He simply fell on his back unconscious and "just laid there staring up in the sky" (A. [illegible]) unable to speak or move. No one of Braswell's medical witnesses expressed any opinion that his prolonged period of unconsciousness, fall and resulting injury had any relationship to his work, or that his assistance in moving the ties which involved carrying approximately fifty pounds for a distance of twelve feet, as he did and had repeatedly done before, might have caused or contributed to cause such condition. Had any of them so believed, he could have so testified. No such testimony, however, was asked for or given. Braswell's explanation of his condition was no more helpful, since he answered his counsel's direct question of "What happened?" by saying, "I don't know. I wish I did know what happened" (A. 92). If Braswell was unable to give any explanation for his unconsciousness, and if none of his lay and medical witnesses could offer any opinion or reason therefor, how could the jury have properly found that Braswell's unconscious condition, fall and vertebral deformities were causally related to respondent's alleged negligence in reemploying him? The jury's conclusion that Braswell's injuries were causally related to respondent's claimed negligence in returning him to work was refuted by Braswell's express testimony and, as the Appellate Court found, was unsupported by

any evidence or circumstance of record. While this Court has gone far to credit verdicts of juries in this class of cases, it has not to this point held that a railroad worker may recover damages from his employer when his own testimony refutes his right to such recovery and there is otherwise an entire absence of any proof to causally relate the injuries which he claims to the negligence which he charges.

B) **Speculation Cannot Supply the Place of Proof.**

Braswell's account of the events preceding his loss of consciousness and the absence of any testimony or circumstance to account for or explain it left the jury without any evidence or circumstance from which it could properly reach the conclusion that Braswell's unconscious condition, fall and injury resulted "from the strain and exertion of lifting "the four ties which he helped carry. The jury's verdict that Braswell's unconsciousness was so caused, as the Appellate Court found, was necessarily based entirely on speculation and surmise. This Court and others have held that speculation cannot supply the place of proof and that damages for personal injuries may not be awarded on speculation and conjecture.

In **Moore v. Chesapeake & Ohio Railway Co.**, 340 U. S. 573, 95 L. ed. 547, 71 S. Ct. 428, the lower court set aside plaintiff's jury verdict and entered judgment for the Railway. This Court affirmed because the verdict was based on speculation. In doing so it held, p. 575:

> "To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. **Tennant v. Peoria & P. U. R. Co.**, 321 U. S. 29, 32, 88 L. ed. 520, 523, 64 S. Ct. 409, 15 N. C. C. A. N. S. 647. The negligence she alleged was that respondent's engineer made a sudden and unexpected stop without warning, 'thereby

causing decedent to be thrown from a position of safety on the rear of the tender' into the path of the train."

This Court said further, p. 576:

"The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped."

and concluded, pp. 577-578:

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. **Speculation cannot supply the place of proof. Galloway v. United States**, 319 U. S. 372, 395, 87 L. ed. 1458, 1473, 63 S. Ct. 1077." (Emphasis supplied.)

Again in **Inman v. Baltimore & O. R. Co.**, 361 U. S. 138, 4 L. ed. 198, 80 S. Ct. 242, a railroad crossing watchman obtained a verdict and judgment for injuries which he alleged were caused by the Railroad's negligence in failing to furnish him a reasonably safe place to work. The Court of Appeals of Ohio reversed this judgment because of a complete failure of proof to establish the negligence charged. This Court affirmed, holding, p. 140:

"The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record."

In **Atchison, T. & S. F. R. Co. v. Toops**, 281 U. S. 351, 74 L. ed. 896, 50 S. Ct. 281, this Court said, pp. 354-355:

"The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

The Court in **Simpson v. Texas and New Orleans Railroad Company** (C. A. 5th), 297 F. 2d 660, held, p. 662:

"Despite some loose talk to the contrary, the plain language of the Federal Employers' Liability Act makes unmistakably clear that it is not a workmen's compensation act but provides relief only for injury or death resulting in whole or in part from the negligence of the employer railroad, * * *."

Again in **Chesapeake & Ohio Ry. Co. v. Thomas** (C. A. 4th), 198 F. 2d 783, it is stated, p. 788:

"The Federal Employers' Liability Act does not make a railroad company an absolute insurer against personal injuries suffered by its employees. There still must be proof of negligence, and that negligence must be in whole or in part the proximate cause of the injuries."

To the same effect is **Milom v. New York Central Railroad Company** (C. A. 7th), 248 F. 2d 52, 55, cert. den. 355 U. S. 953, 2 L. ed. 2d 529, 78 S. Ct. 537.

In **Page v. St. Louis Southwestern Railway Company** (C. A. 5th), 312 F. 2d 84, the Court in referring to the provisions of the Federal Employers' Liability Act, states, p. 87:

"The italicized words, 'resulting in whole or in part from the negligence,' would seem sufficient to place beyond cavil or debate the proposition that the

Act does not provide workmen's compensation, but that liability is based upon negligence having a causal connection with the injury, and both the Supreme Court and this Circuit are committed to that proposition."

Neither Braswell nor any medical or non-medical witness testified Braswell's work in carrying railroad ties for respondent in any manner affected plaintiff's health or physical well being. While there was testimony Braswell did not work as hard as other members of the crew, Braswell testified he felt no ill effects from the work which he did and made no complaint at any time about the work to which he was assigned. No one of Braswell's doctors contended that his work might or could have affected his physical condition in any manner, and, in fact, were not even asked to express an opinion on this subject. Braswell had the burden of proving his charge that he fell unconscious "from the strain and exertion" of lifting the four railroad ties he helped carry. He offered no proof to meet this burden but left the cause of his unconsciousness and fall to the speculation of the jury. This Court has made it clear, as the cases referred to so well demonstrate, that speculation cannot form the basis for a jury's award of damages. The Appellate Court properly entered judgment for respondent.

THE CASES RELIED ON BY PETITIONER.

The authorities on which petitioner depends do not support her contention that the Appellate Court erroneously entered judgment for respondent. Braswell was not in the position of plaintiff's intestate in **Lavendar v. Kurn**, 327 U. S. 645, 90 L. ed. 916, 66 S. Ct. 740. There plaintiff's intestate died as a result of a skull fracture inflicted by " 'some fast moving small round object' " which one of plaintiff's doctors testified might have been attached to a train backing 8 to 10 miles an hour (pp. 648-649). The

testimony, moreover, showed that a train had backed past the deceased at that speed just before he was discovered unconscious and that the curled end of a mail hook could have been positioned on the side of the train in a manner to have struck deceased on the head as he stood next to the track where his body was found. The evidence established the cause of death and demonstrated by circumstances the manner in which the fatal injury was inflicted. In **Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443, plaintiff fell from the top of a culvert when he stepped on loose gravel negligently left thereon and where he had gone in furtherance of explicit orders to watch for hotboxes on passing trains. The fact that plaintiff's injuries were causally related to his fall from the culvert was not in dispute. Plaintiff, in **Sinkler v. Missouri P. R. Co.**, 356 U. S. 326, 2 L. ed. 2d 799, 78 S. Ct. 758, was injured when a railroad car in which he was working was negligently switched into violent collision with a second car. The causal connection between plaintiff's injuries and the collision resulting from the negligent switching movement was not disputed. Again, in **Southern Railway Co. v. Welch** (C. A. 6th), 247 F. 2d 340, plaintiff alleged and proved defendant was negligent in failing to provide him with sufficient help in moving 1600 pound rails and two physicians testified his injury was causally related to his work in moving such rails. Plaintiff's intestate, in **Tiller v. Atlantic Coast Line R. Co.**, 318 U. S. 54, 87 L. ed. 610, 63 S. Ct. 444, while inspecting seals on a train which was moving slowly on one track was hit and killed by the rear car of a backing train on an adjoining track. The evidence sufficiently showed the cause of death. Likewise in **Harrison v. Missouri Pacific R. Co.**, 372 U. S. 248, 9 L. ed. 2d 711, 83 S. Ct. 690, there was no question that plaintiff was not injured as th proximate result of being assaulted by a section laborer. This Court determined only that plaintiff's testimony raised a jury question of whether or not defendant had knowledge that

the section hand was a "bad actor" so that it might have foreseen that the assault would occur. Finally, in **Siete v. Industrial Comm.**, 24 Ill. 2d 368, 181 N. E. 2d 156, which involved a proceeding brought under the provisions of the Illinois Workmen's Compensation Act, so that negligence was not involved, the causal connection between the injury and death was clear, as the Court held, p. 159: "In addition, the medical testimony and hospital records certainly established a causal connection between the accidental injury and the ensuing death the next day."

CONCLUSION.

The record in this case contains no evidence or circumstance to explain Braswell's unconsciousness, fall and resulting injury. It does, however, clearly show that Braswell, as he testified, experienced no strain or exertion in helping carry the four ties to the push car on July 3 in the same way he had done many times before on preceding days. He suffered no pain, felt no unusual physical symptom of any kind and simply and without any cause or reason which he or any of his doctors or other witnesses could describe, lost consciousness and fell on his back. To argue, as petitioner does here and did in the Appellate Court, that such loss of consciousness was the result of "strain and exertion of lifting ties" is to resort to unsupported speculation which the factual evidence clearly disputes.

The Appellate Court properly determined there was no evidentiary basis for the verdict which the jury returned. It had no legal alternative to do otherwise. In so doing it did not, as petitioner argues, ignore the provisions of the Federal Employes' Liability Act and the opinions of this Court, for that Act does not intend, and this Court, nor any other, has declared, that damages may be awarded for personal injuries in the absence of any proof to causally relate the injuries claimed to the negligence charged.

The judgment of the Appellate Court reversing the ju
ment of the Circuit Court of Madison County was and
correct. The petition for a writ of certiorari should
denied.

Respectfully submitted,

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